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No. 82-637

In the Supreme Court of the United States

OCTOBER TERM, 1982

SAVE THE VALLEY, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The court of appeals rejected petitioner's challenges to the Clean Water Act and Clean Air Act permits issued by respondent Environmental Protection Agency for a new electric power plant in Kentucky. In a collateral administrative proceeding, however, petitioner obtained certain modifications to the Clean Water Act permit. Petitioner then applied to the court of appeals for an award of attorney's fees and costs under Section 307(f) of the Clean Air Act. The court of appeals denied this application without opinion.

The question presented is: whether the denial of the application for attorney's fees and costs was in these circumstances an abuse of discretion.

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OPINIONS BELOW

The court of appeals' orders (1) rejecting petitioner's challenge to the air quality permit (Pet. App. 4a); (2) rejecting petitioner's challenge to the water discharge permit (Pet. App. 2a); and (3) denying petitioner's application for an award of attorney's fees (Pet. App. 1a) are unreported.

JURISDICTION

The court of appeals' order denying petitioner's motion for an award of attorney's fees and costs (Pet. App. 1a) was entered on July 14, 1982. The petition for a writ of certiorari was filed on October

12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 29, 1979, petitioner Save the Valley, Inc. filed a petition for review challenging the issuance of two permits by respondent Environmental Protection Agency, to the Trimble County (Kentucky) Generating Station owned by Louisville Gas & Electric Company ("LG&E"). The first permit was issued under the Clean Water Act to control the discharge of pollutants into the Ohio River during construction and operation of the Trimble County Generating Station. The second permit was issued under the provisions of the Clean Air Act that prevent significant deterioration of air quality in areas that have achieved the national ambient air quality standards. The petition for review was filed under Section 509(b)(1)(F) of the Clean Water Act, 33 U.S.C. 1369(b)(1)(F), and Section 307(b) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b).

In the court of appeals, petitioner sought to invalidate both permits and to halt the construction of LG&E's facility. Petitioner contended primarily that the Clean Water Act permit was invalid, arguing that EPA should have held an adjudicatory hearing on the adequacy under the National Environmental Policy Act ("NEPA") of the accompanying environmental impact statement ("EIS") before issuing the permit. Petitioner also argued that the Clean Air Act permit was invalid because EPA did not hold a second public comment period on that permit during the agency's reconsideration of the proposed permit in light of enactment of the 1977 amendments to the Clean Air Act (Pet. 3-4; Pet. App. 5a).

2. After the court of appeals twice denied motions to stay the construction of the plant pending judicial review, briefing in the case went forward. By that time, EPA had already agreed that an adjudicatory hearing should be held on issues related to the Clean Water Act permit and the associated EIS, and the Agency therefore argued to the court of appeals that judicial review of the permit or of the EIS would be premature. EPA defended the validity of the Clean Air Act permit against petitioner's challenge (Pet. App. 5a-6a).

On July 16, 1980, the court of appeals issued an order (Pet. App. 4a-6a) upholding the validity of the Clean Air Act permit, thereby terminating the Clean Air Act litigation, and advising the parties that proceedings respecting the remaining issues would be held in abeyance pending the outcome of the adjudicatory hearing on the Clean Water Act permit and the associated EIS being conducted by EPA. The court stated that any action to review EPA's ultimate decision on the Clean Water Act permit would be consolidated with proceedings on the issues held in abeyance. In the wake of that adjudicatory hearing, in December of 1980, certain modifications were made in the Clean Water Act discharge permit that had been issued for LG&E's Trimble County Generating Station (Pet. Supp. App. 30a). All administrative proceedings were completed on September 24, 1981, when the Administrator of EPA issued her final decision approving the Clean Water Act permit as modified (Pet. Supp. App. 55a). Petitioner did seek review of that action.

On March 4, 1982, the court of appeals entered its final order in this case, upholding the validity of the Clean Water Act permit challenged by petitioner (Pet. App. 2a).

3. Although EPA had prevailed on all issues decided by the court of appeals, petitioner nonetheless sought an award of costs including attorney's fees in the amount of $97,925.28 under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f) (Pet. 7). The award sought embraced all time expended by petitioner's counsel in connection with the petition for review, on petitioner's Clean Water Act and National Environmental Policy Act claims, as well as its Clean Air Act claim. Also included was time expended after the date of filing of the petition for review on administrative proceedings related to the Clean Water Act and NEPA issues. EPA opposed any award of attorney's fees on the grounds that: (1) the dominant share of the time expended by petitioner's attorneys on this case was devoted to issues under the Clean Water Act, which does not authorize fee awards in cases such as this; (2) this is not an "appropriate" case for a fee award under Section 307(f) of the Clean Air Act, because petitioner neither prevailed on its single Clean Air Act claim nor showed that this litigation significantly furthered the objectives of the Clean Air Act; and (3) the documentation supplied by petitioner's counsel did not permit segregation of the time spent on the Clean Air Act issue from the time devoted to the other claim. EPA also challenged the amount of the fee award requested by petitioner's counsel, on the ground that neither the hours expended nor the hourly rate claimed was properly documented.

On July 14, 1982, the court of appeals denied petitioner's application for fees and costs "[u]pon the record before us" without entering any opinion (Pet. App. 1a).

ARGUMENT

The court of appeals did not abuse its discretion in denying petitioner's application for attorney's fees and costs in the circumstances of this case. The disposition of that application without an opinion merely settled rights between the parties to this case, and established no precedent, much less one of general importance. Nor was the court of appeals' failure to issue an opinion itself such a departure from accepted judicial practices as to require intervention by this Court. Further review accordingly is not warranted.

1. Petitioner suggests (Pet. 8) that review should be granted in this case to provide guidance to the lower courts in determining when an award of attorney's fees is "appropriate" within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). We agree with petitioner that the question thus identified in abstract form is an important one with significant unsettled aspects. Indeed, the Court has recently granted our petition, *Gorsuch* v. *Sierra Club*, No. 82-242 (Oct. 18, 1982), to address the question whether it can be "appropriate" to award fees under Section 307(f) to a party that has not prevailed upon any aspect of its petition for review. In *Sierra Club* v. *Gorsuch*, 672 F.2d 33 1982), the decision this Court has agreed to review, the United States Court of Appeals for the District of Columbia Circuit, after extended analysis, concluded that it was appropriate to award fees in the circumstances described where the party's presentation substantially advances what the court took to be the Clean Air Act purpose of encouraging judicial resolution of "important, complex and novel" (*id.* at 39) questions of statutory interpretation under the Act.

Unlike *Sierra Club* this case is an inappropriate vehicle for any needed clarification of the law, because the court of appeals did not issue any opinion, much less announce any standard governing the availability of attorney's fees.[1] For this reason, not only does the decision below fail to conflict with any decision of this Court or of any other court of appeals, but it presents no question to be reviewed by this Court. See, e.g., *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980).[2]

2. Nor does the court of appeals' failure to render an opinion in this case itself warrant review. None of the decisions cited by petitioner (Pet. 18) for the proposition that denial of fees without an opinion is an abuse of discretion involved the statute at issue here, Section 307(f) of the Clean Air Act. Significantly, all of the cited cases involved statutes, such as the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988, that authorize fee awards to a "prevailing party," which have been interpreted to require an award to such a party "unless special circumstances would render such an award unjust" (*Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Some courts of appeals have thought that "[i]mplicit in [such statutory language]

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[1] Under Rule 11 of the Rules of the United States Court of Appeals for the Sixth Circuit opinions designated "not for publication" have no precedential effect. While the order in this case is not formally so designated, given that no opinion was issued, the court's order plainly is not intended to have the force of precedent.

[2] As petitioner observes (Pet. 8 n.5), the petition in *Manchester Environmental Coalition* v. *EPA*, No. 82-247, raised a question similar to that tendered for review here. This Court denied the petition in No. 82-247 on November 29, 1982.

is a requirement that a court which denies an award of attorney's fees [to a prevailing party] must issue findings of fact and conclusions of law identifying the 'special circumstances' and explaining why they render an award unjust." *Sethy* v. *Alameda County Water District*, 602 F.2d 894, 897 (9th Cir. 1979).[3] This reasoning simply does not apply here because Section 307(f) of the Clean Air Act does not employ a "prevailing party" standard for awards of attorneys' fees.

Nor do any of the decisions cited by petitioner concern fee awards upon petitions for review of agency action that are within the original jurisdiction of the courts of appeals. Plainly, the need for findings of fact and conclusions of law that explain the disposition of a fee request is much less in this situation than in cases originating in district court, where the unsuccessful fee applicant may appeal as of right. Establishing a record for appellate review is the primary purpose of such findings and conclusions. *Copeland* v. *Marshall*, 641 F.2d 880, 901 n.39 (D.C. Cir. 1980) (en banc); *Murphy* v. *Kolovitz*, 635 F.2d 662, 664 (7th Cir. 1981); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974). Moreover, the requirements of Fed. R. Civ. P. 52(a) are not applicable to petitions for review in the courts of appeals.

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[3] The Court granted certiorari in *Consolidated Freightways Corp.* v. *Kassel*, No. 79-1618, to address this issue. 450 U.S. 1039 (1981). The writ of certiorari, however, was dismissed as improvidently granted. *Consolidated Freightways Corp.* v. *Kassel*, No. 79-1618 (Feb. 23, 1982). Justice White dissented from that disposition, stating that he would have affirmed the decision of the court below, explaining that there is no "*per se* rule that a court may never summarily deny an application for fees."

It may be that the better practice would have been for the court of appeals to explain its decision, at least briefly in an appropriate memorandum. Nevertheless, there is no occasion for further review in this case. First, as is explained below (pages 9-15, *infra*), the denial of attorney's fees in this case was not an abuse of discretion. In these circumstances, to vacate the order of the court of appeals denying fees and costs and remand for further proceedings would be a sterile exercise that would needlessly prolong this litigation. A case such as this is an unsuitable vehicle for establishing criteria for the disposition of attorney's fees applications without opinion.

Second, the practice of summary disposition without opinion is regularly employed by the courts of appeals, not only for ancillary motions such as this, but also for disposition on the merits of appeals from district courts, in cases where the proper disposition is clear, no precedent is needed or created, and the disposition is fact-bound rather than based on recurring questions of general importance.[4] Summary dispositions, if not abused, are an acceptable response to the problem of judicial management stemming from burgeoning caseloads. Absent a showing that the practice is being systematically abused in acting on applications for attorney's fees in connection with petitions for review, we suggest that there is no compelling reason for this Court to intervene. See *Consolidated Feightways Corp.* v. *Kassel*, No. 79-1618 (Feb. 23, 1982) (White, J., dissenting from dismissal

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[4] See D.C. Cir. R. 13(c); 1st Cir. R. 14; 2d Cir. R. 0.23; 4th Cir. R. 7(b); 5th Cir. R. 21; 6th Cir. R. 9(d); 8th Cir. R. 14; 9th Cir. R. 21; 10th Cir. R. 17(b); 11th Cir. R. 25.

of writ of certiorari as improvidently granted) (see page 7 note 3, *supra*).

3. In any event, the court of appeals' determination that an award of attorney's fees was not "appropriate" in the circumstances of this case entails no abuse of discretion.

a. The court of appeals could properly have determined that no award of fees or costs was warranted because petitioner did not prevail in any respect upon its single claim under the Clean Air Act.[5] Petitioner seeks to obscure that failure by discussing at length what it characterizes variously as "clean air issues," issues pertaining to "air quality * * * protection," "clean air protection[]," or "clean air measures," and as "clean air claims" or "clean air relief" (Pet. 4, 5, 9, 10, 12, 13), on which it claims to have achieved some measure of success, albeit only in collateral administrative proceedings. But petitioner's semantic artistry should not be permitted to disguise the fact that the issues upon which it has allegedly prevailed arose only under the Clean Water Act or, indirectly, the National Environmental Policy Act. See pages 2-3, *supra*.[6] Because neither of

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[5] Petitioner has apparently abandoned the contention advanced below that fees may be awarded directly under the Clean Water Act. In this Court petitioner argues only that an award of fees should have been made under Section 307(f) of the Clean Air Act.

[6] In petitioner's own words, petitioner's claim was that the permit *issued under the Clean Water Act* was invalid (Pet. 4)

> because (1) EPA had denied [petitioner's] request for an adjudicatory hearing to consider the adequacy of the EIS on which the permit decision was based, and (2) because the EIS was legally insufficient in its consideration of important clean air issues, including the enforceabil-

those statutes makes provision for an award of attorney's fees, and because the courts ordinarily lack authority to make such an award absent statutory authority, see *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 269 & n.44 (1975); 28 U.S.C. 2412, petitioner's alleged success in administrative proceedings in connection with certain claims under these statutes can afford no basis for recovery of attorney's fees.

Nor is there any basis in this case for petitioner's assertion (Pet. 9-10, emphasis added) that unless fees are to be awarded for services performed in litigation under statutes other than the Clean Air Act "the Agency would be able to insulate itself from the attorney's fee provisions of [that] Act * * * by placing controversial *clean air measures* in a plant's" Clean Water Act permit or environmental impact statement. No such risk exists here because petitioner has never urged in this case, nor could it, that the claims it sought to raise under the National Environmental Policy Act (see page 9, note 6, *supra*) could properly have been framed as claims arising under the Clean Air Act. Thus, this simply is not a case where the agency might have sought to avoid an adverse judgment *under the Clean Air Act* by settling a valid claim without affording formal relief under

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ity of [a restrictive] "stipulation" [incorporated in the statement], and the failure to conduct modeling of the plant's effects on overall air pollution in the Ohio River Valley and on acid rain.

None of these issues arose under the Clean Air Act. The only Clean Air Act issue that was raised by petitioner was the claim, rejected by the court of appeals (see pages 2-3, *supra*), that EPA has improperly failed to provide a second comment period on the terms of a proposed air pollution permit.

that Act. Petitioner's reliance upon NEPA is an especially telling consideration, for where applicable that statute will often require a broadly framed inquiry into matters extending far beyond the requirements of actual regulatory pollution control legislation.[7] Because Congress has chosen not to authorize awards of attorney's fees under NEPA, while it has provided such authority under the Clean Air Act, the courts are required to be especially alert to distinguish between claims that arise under the Clean Air Act and those that do not in awarding fees.

Petitioner invokes (Pet. 11) an assertedly "well settled" rule that "where a party brings several different claims arising from 'a common nucleus of operative fact,' and prevails upon one of these claims, courts will award attorney's fees on the basis of one of the related claims." The "rule" actually flows from, and is limited to, the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988. As this Court stated in *Maher* v. *Gagne*, 448 U.S. 122, 132 n.15 (1980), the legislative history of that Act

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[7] The Energy Supply and Coordination Act of 1974, 15 U.S.C. 793(c)(1), provides that no action under the Clean Air Act may be deemed a major federal action for NEPA purposes. Congress has thus indicated that EPA's actions under the Clean Air Act are to be judged by reference to the terms of that Act, and not by reference to the more open-ended analysis contemplated by NEPA. However, because the comparable provision of the Clean Water Act, 33 U.S.C. 1371(c)(1), is less inclusive in some respects, an EIS was prepared to accompany the Water Act permit challenged by petitioner. Only thus was petitioner able to raise the "air pollution" issues on which it claims to have partially prevailed. Under the circumstances, it would be especially inappropriate to award attorney's fees under the Clean Air Act for legal services rendered in connection with petitioner's NEPA claim.

"makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act." No comparable legislative history exists under the Clean Air Act. Under these circumstances Congress' decision not to provide for any award of fees for petitioner's litigation under NEPA and the Clean Water Act must be honored.

As we have shown, the only claim resting upon the Clean Air Act advanced by petitioner was that EPA impermissibly omitted a second comment period respecting the terms of the Clean Air Act permit issued to LG&E. This claim was rejected by the court of appeals and was not the subject of any collateral administrative proceedings. Petitioner's argument (Pet. 13-15) that in enacting Section 307(f) Congress intended that fees be afforded to parties that prevail as a practical matter without actually securing a favorable final judgment is accordingly irrelevant to this case. Petitioner gained no measure of success, formal or informal, in judicial or administrative proceedings, on its Clean Air Act claim.[8]

b. Petitioner argues, however (Pet. 15-16), that an award of fees was required even if it is regarded as having failed in all material respects upon its claims. In support of that contention petitioner cites *Sierra Club* v. *Gorsuch*, *supra*, and *Northern Plains Resource Council* v. *EPA*, 670 F.2d 847 (9th Cir. 1982). These cases are, in our view, wrongly de-

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[8] Petitioner's attempt (Pet. 17) to find support for its position in our petition in *Gorsuch* is accordingly unavailing. Petitioner did not aid in rectification of any "administrative error[]" under the Clean Air Act.

cided, as is explained in our brief in *Gorsuch*.[9] But, whatever this Court may ultimately decide in *Gorsuch*, these cases provide no support for petitioner's position in this case. In *Gorsuch*, the D.C. Circuit made clear that non-prevailing parties ordinarily will *not* be entitled to an award of fees under Section 307(f), describing such an award on an "exceptional" event. 672 F.2d at 39. Indeed, under the D.C. Circuit's view, with which we agree in this respect (see Brief in No. 82-242 at 30), even a prevailing party must demonstrate it has substantially contributed to attainment of the goals of the Clean Air Act. *Sierra Club* v. *Gorsuch*, *supra*, 672 F.2d at 38 n.8. Applying the criteria employed by the D.C. Circuit, see 672 F.2d at 38-41 & n.10, it is apparent that the relatively simple question of administrative procedure addressed by petitioner was not "important, complex [or] novel" (*id.* at 39). And in view of the limited attention given this issue in petitioner's briefs and oral argument in the court of appeals, the court below need not have concluded that petitioner's "assistance in the resolution of the issue[] was substantial" or that the "caliber of [its] written and oral presentations was exemplary" (*id.* at 39) as did the D.C. Circuit in *Gorsuch*. Accordingly, even if *Sierra Club* v. *Gorsuch* were correctly decided, it gives no comfort to petitioner.[10]

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[9] A copy of that brief has been served upon petitioner together with this brief in opposition.

Because the Ninth Circuit has yet to fix the amount of the award in *Northern Plains Resource Council*, its decision respecting attorney's fees is not, as yet, final.

[10] Reliance upon *Northern Plains Resource Council*, *supra*, is likewise misplaced. In its brief order, the Ninth Circuit did not identify the standard employed in determining whether

c. The court of appeals may also have moved to deny petitioner's application because of technical deficiencies therein. As noted above (pages 2, 9 note 6), the heart of petitioner's case was a claim under the Clean Water Act and NEPA, statutes that do not authorize any award of fees. Yet, petitioner's fee application failed to separately identify the time devoted to the Clean Air Act aspect of the case. Moreover, most of the time ostensibly expended on the Clean Water Act and NEPA claims was devoted to a collateral administrative proceeding, not to this litigation, and is for that reason noncompensable. See *Sierra Club* v. *Gorsuch*, *supra*, 672 F.2d at 42. In addition, petitioner furnished no evidence at all of the reasonableness of the hourly rates charged by its counsel in connection with this case, although such a showing is an essential element of a fee application. See *National Association of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1324-1327 (D.C. Cir. 1982) (per curiam). Finally, petitioner's application rested almost entirely on a computer print-out generated for billing purposes. As EPA pointed out, and as petitioner conceded in the court of appeals (Second

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fees were properly awarded in that case, or even acknowledge explicitly that the party to which fees had been awarded had not prevailed on any aspect of its claim. In any event, assuming that the Ninth Circuit employed criteria similar to those adopted by the D.C. Circuit in *Gorsuch*, its decision does not aid petitioner. A cursory comparison of the Ninth Circuit's opinion on the merits of the complex and technical Clean Air Act issues raised by the Northern Plains Resource Council, see *Northern Plains Resource Council* v. *EPA*, 645 F.2d 1349 (1981), with the decision of the court of appeals below on the merits of petitioner's single Clean Air Act-related claim (Pet. App. 4a-6a), readily demonstrates that the award in the former case provides no precedent for a similar award here.

Affidavit of Duane Siler, attached to Petitioner's Reply Brief in Support of its Motion for Costs of Litigation), this print-out included some amount of attorney time actually spent on unrelated matters, as well as some attorney time that was incompletely identified. In view of these alternative technical bases for denying petitioner's applications for fees and costs, no recurring question of general importance is presented by that denial.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] We think it unnecessary to hold the petition for possible future disposition in light of a decision in *Gorsuch* v. *Sierra Club*, *supra*. A decision in that case cannot be expected to shed any light upon the permissibility of disposition of fee applications without opinion—the only question directly presented on the record of this case.

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